in paragraphs 15 and 16. In essence he deposed that the plaintiffs will not suffer irreparable damage because by the plaintiffs' actions in stopping their supply of petroleum products to him, he had been compelled to buy Caltex petroleum products from other dealers at a premium in order to continue his supply to his customers at the usual rates, thus losing profit. He further undertakes to sell only Caltex petroleum products to assuage any real or apparent fear of the plaintiffs.

Therefore the position is this. The defendant does not dispute the plaintiffs' legal title. He is in physical possession of the plaintiffs' service station, premises and equipment. The supply of petroleum products from the plaintiffs have been stopped by the latter. In order to continue with the supply of Caltex petroleum products to his clients he deposed that he had to buy them from other retailers at a high premium thus selling them at a loss. His affidavit does not disclose either the name or names of the alleged retailers or the amount of petrol products purchased. On the other hand the plaintiffs want him to vacate the premises and the service station so as to restrain him from buying Caltex petroleum products from other retailers. There is no guarantee in spite of the defendant's undertaking not to sell petroleum products other than Caltex that such sales effected or to be effected are from the plaintiffs' supply. That is the mischief complained of. It may well be that that is not only a breach of the licensing agreement to buy Caltex petroleum products from the plaintiffs but the retailers might also be in breach of the agreement to sell the plaintiffs' products to the defendant in bulk.

In my opinion the plaintiffs' inconvenience exceeds that of the defendant. To allow the defendant to stay would be otiose because his supply had been stopped by the plaintiffs. To allow him to purchase Caltex petroleum products from other retailers would not only cause him inconvenience and hardship but would entail considerable loss. The only course for him to do, as I see it, is to await the final outcome of the trial. The plaintiffs have given an undertaking in damages, if any, if it is proved at the trial that the injunction was wrongly granted. On the other hand irreparable damage both in terms of money and reputation would be occasioned to the plaintiffs by refusing the injunction than is likely to be caused to the defendant if the injunction is granted. I may usefully refer to a well-known passage in *Kesho Prasad Singh* v. *Srinibash Prasad Singh* (1) which in my opinion is of great assistance to our present case.

"It is well settled that, as a general rule where the plaintiff is out of possession and claims possession, the court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right; but where the threatened injury would be irreparable, an injunction will be granted at the instance of a complainant out of possession. . . ."

It cannot be said that by granting the injunction the action is completely disposed of since the plaintiffs by their statement of claim are also claiming damages.

The submission of counsel on the provisions of section 54(f) and (i) of the Specific Relief (Malay States) Ordinance, 1950 cannot be accepted. That section specifies the defences that may be set up in a suit for a perpetual injunction. Such is not the case before us. Likewise section 21 of the said Ordinance is not applicable for the present case does not involve the consideration of specific performance.

Injunction granted.

Solicitors: *Shearn, Delamore & Co.; Athi Nahappan & Co.*

YAH BINTI AJI v. FATIMAH BINTI HAJI MOHAMED ARIFFIN & ORS.

[O.C.J. (Chang Min Tat J.) May 27, 1969]
[Ipoh — Civil Suit No. 77 of 1964]

Practice and Procedure — Application to call further evidence after close of case for defendants — Principles applicable.

Evidence — Fresh evidence — Principle applicable.

After the close of the case for the defendants, application was made to call further evidence for the defence. Counsel for the defendants said that he had unearthed certain evidence which was not only material to the claim but would perhaps be decisive.

Held: the defendant had not shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial and therefore the application must be dismissed.

Cases referred to:—

(1) *Re Chennell* (1877), 8 Ch. D. 492 at p. 506.

(2) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489.

CIVIL SUIT.

C.C. Goh for the plaintiff.

M. Sivalingam for the defendants.

Chang Min Tat J.: After the close of the case for the defendants and not before (so that it was not a matter of calling rebutting evidence) counsel for the defendants applied to call further evidence. He said he had unearthed certain evidence which was not only material to the claim but would perhaps be decisive.

Counsel for the plaintiff, not unnaturally, perhaps, opposed the application. He did not think it fair that the other side should have two bites of the apple but otherwise produced no authority in support of his opposition.

Counsel for the defendants relied on certain authorities which were all cases where the appellate court had allowed further evidence to be called on appeal, but admitted he could not uncover any case directly in point. He however produced a number of authorities to show that in certain cases further evidence was allowed to be led on appeal.

Now such evidence on appeal is normally let in under the provisions of R.S.C. Order 58 r. 4 and it could be argued against this application that there is no such rule in the R.S.C. for calling further evidence at the close of the case of one party other than by way of rebuttal and that the case of *Re Chennell* [1] on which the defendants relied, a case of exclusion at the hearing of evidence which had been before the judge in chambers, was not particularly in point.

After due consideration, I take the view that if under certain conditions, further evidence was allowed to be adduced on appeal, such evidence should under the same conditions be adducible at the hearing in the first instance, even though the side seeking to adduce such evidence had closed its case. An appeal is always by way of rehearing and if such evidence is let in at the appellate stage where the case is being reheard, I for one can see no justification for its exclusion when the case is being heard.

These conditions have been stated in many authorities. I take the statement of Denning L.J. (as he then was) in the case of *Ladd* v. *Marshall,* [2] (at page 1491) as being, with respect, the most succinct:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

Now the matter in dispute in this suit is the ownership of a piece of land. The name of the registered proprietress at a certain stage was Yah binti Che Aji, which is the name by which the plaintiff is now known, though it would appear that she was earlier known as Sabariah. She says the land was applied for by her husband and registered in her name before her divorce and that subsequently she handed the document of title to her half-sister Hamsiah binti Che Aji, who consequent on her pilgrimage to Mecca became known as Haji Rogayah which was by the familiar process of diminution of names shortened to Yah. Haji Rogayah is now dead but before her death she had the land transferred to the defendants who are members of her family.

Counsel for the defendants now seeks to call the Secretary to the Religious Affairs Department to produce the divorce register to prove that the evidence of the plaintiff was contradicted by the particulars therein and also one Haji Saad who claims to know the parties personally. Counsel bases his application on two grounds (1) Haji Saad was away in Mecca and could not be called earlier, and (2) it was impossible for him to uncover this evidence beforehand. It seems to me however having regard to the conduct of the case that Haji Saad was discovered only subsequent to the closing of the defendants' case. There had never been shown any embarrassment on the part of the defendants to have the case heard and there never was any application for an adjournment or thought of one at the hearing. It is alleged by counsel for the defendants in a short statement from the Bar that it was impossible for the defendants to know beforehand, but why it was impossible has never been made clear to me. The divorce register was available at all times. Reasonable diligence if applied would surely have uncovered it.

It seems to me after due consideration that while the second and third conditions of Lord Denning's statement might have been met (on this I express no firm opinion), counsel for the applicant has singularly failed to satisfy the first condition. I do not think it is open to me to waive this condition. The application is therefore disallowed.

Application disallowed.

Solicitors: *C.C. Goh; Lim Cheng Ean & Co.*

RAMASAMY v. SUPPIAH

[O.C.J. (Chang Min Tat J.) May 27, 1969]

[Ipoh — Civil Suit No. 139 of 1964]

Moneylending — Memorandum of loan supplied to defendant — Whether memorandum a promissory note — Whethere memorandum has to be translated and interpreted to defendant — Moneylenders Ordinance, 1951, ss. 16 & 27.

In this case the plaintiff, a licensed moneylender, sued for repayment of a sum of $500 alleged to be lent by him to the defendant. It was alleged by the defendant that he was not given a copy of the I.O.U. chit or the said memorandum, since he did not understand the English language.

Held: (1) on the facts the defendant had not rebutted the presumption contained in the acknowledgement in the memorandum authenticated by the plaintiff;

(2) as the memorandum in this case was not a promissory note there was no requirement that it should be translated or interpreted to the borrower.

Case referred to:—

(1) *Akbar Khan* v. *Attar Singh* [1936] 2 All E.R. 545 at p. 549.